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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CHAPALA MANAGEMENT CORPORATION, Plaintiff and Respondent, v. THOMAS STANTON et al., Defendants and Appellants.	D055532 (Super. Ct. No. 37-2008-00079704-CU-OR-CTL)

APPEAL from a judgment and postjudgment order of the Superior Court of San Diego County, Steven R. Denton, Judge, and related writ petition. Judgment and postjudgment orders affirmed. Petition for writ of supersedeas granted.

Lynn & Fortune, Robert H. Lynn; Mugglebee & Mugglebee and Stephen T. Mugglebee for Defendants and Appellants.

Epsten Grinnell & Howell, Rian W. Jones and Carrie M. Timko for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, III, IV, and V.

Defendants and appellants Thomas Stanton and Donna Stanton replaced two windows in their condominium with "sandtone" colored windows after the condominium association, Chapala Management Corporation (Association), had denied their application for those improvements on grounds they were not an approved color. Association thereafter filed suit and, following a bench trial, obtained a judgment against the Stantons for injunctive and declaratory relief declaring them in violation of Association's amended and restated declaration of covenants, conditions and restrictions (CC&Rs) and requiring them to modify or replace their windows under the approval of Association's architectural review committee (at times hereafter the ARC). The trial court ordered the Stantons to pay attorney fees and thereafter ordered them to post a bond or undertaking to stay the collection of the attorney fee award. The Stantons appealed from the judgment without filing an appeal bond or other undertaking.

On appeal from the judgment, the Stantons contend the trial court erred by (1) granting an injunction when Association had specific and adequate legal remedies under the CC&Rs; (2) ignoring Civil Code requirements granting defendants a hearing before Association's board of directors (the Board); (3) holding that the term "aesthetic" permits the architectural review committee to disregard provisions of the CC&Rs as to window color; and (4) finding that the architectural review committee's actions were not arbitrary, capricious or discriminatory. The Stantons further appeal from the order awarding attorney fees, asking us to vacate the order if they prevail on appeal.

In their subsequently filed writ petition, the Stantons contend an undertaking is not required to stay an award of costs made in connection with a judgment for injunctive

relief. They asked for an immediate stay of the order requiring that they post an undertaking. We issued the stay, ordered that the arguments in the petition and response be considered with this appeal, and deferred ruling on the petition until disposition of the appeal.

We affirm the judgment and postjudgment order awarding attorney fees. As we explain below, we dissolve the stay and grant the Stantons' petition for writ of supersedeas.

FACTUAL AND PROCEDURAL BACKGROUND

The factual background is taken from the facts and evidence in the record and the trial court's statement of decision. We view the facts most favorable to the judgment under the principle requiring us to presume the lower court's judgment is correct and draw all inferences and presumptions necessary to support it. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Ermoian v. Desert Hosp.* (2007) 152 Cal.App.4th 475, 494.) " 'Where [a trial court's] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.' " (*In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 342.) If the statement of decision is ambiguous or omits material factual findings, we will infer any factual findings necessary to support the judgment. (*Ermoian v. Desert Hosp.*, at p.

494.)[1]

In December 2006, the Stantons, owners of a unit located in the Association, submitted to Association a series of applications seeking the architectural review committee's approval of exterior improvements consisting of the replacement of two casement windows on the south side of their unit, facing the common area. They sought to use windows that were "sandtone" in color.

Association's CC&Rs, recorded in 1996, require that the location and plans and specifications of improvements to any unit's exterior be approved by Association's three-member architectural review committee.[2] The CC&Rs state the "ARC shall review and

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1 Before trial, the Stantons requested that the trial court issue a proposed statement of decision on numerous issues. Association submitted its own proposed statement of decision. After trial, the court issued an oral statement of decision. The Stantons thereafter objected to Association's proposed statement of decision on grounds it did not accurately reflect the complete record as read by the court. They also objected to the trial court's oral statement of decision on grounds it did not "explain the factual and legal basis for its decision as to each of the principal controverted issues at trial as previously requested by the Defendants; it is controverted by the evidence and testimony given during trial; and/or it is not supported by any evidence or testimony given at trial." The trial court overruled the Stantons' objections and on April 29, 2009, issued its written statement of decision. On appeal, the Stantons attack only the trial court's factual findings as to the arbitrary, capricious or discriminatory nature of the Association's acts. They do not raise any specific defects, omissions or ambiguities in the trial court's written statement of decision on appeal. Because the Stantons did not bring to the trial court's attention defects in its written statement of decision by filing specific and particular objections under Code of Civil Procedure section 634 prior to the entry of judgment (see *Ermoian v. Desert Hosp.*, *supra*, 152 Cal.App.4th at pp. 497-498; see also *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372, 1380), we will apply the doctrine of implied findings and infer factual findings necessary to support the judgment. (*Ermoian*, at pp. 494-495, 498-500.)

2 Article XV, section 2 of the CC&Rs states in part: "No building or other structure or improvement, including, but not limited to, landscaping, shall be erected, placed or

approve or disapprove all plans submitted to it for any proposed improvement, alteration or addition, solely on the basis of aesthetic considerations and the overall benefit or detriment which would result to the immediate vicinity and the Project generally. The ARC shall take into consideration the aesthetic aspects of the architectural designs, placement of buildings, topography, landscaping, color schemes, exterior finishes and materials and similar features . . . ." (CC&Rs, art. XV, § 11.)

Association utilizes a document entitled "Architectural and CC&R Guidelines for Homeowners" (Guidelines) stating that "[a]ll changes or additions either to the exterior of your Living Unit or to your Exclusive Use Area require ARC approval." In part, the Guidelines state: "No building or other structure or improvement, including landscaping, shall be erected, placed or altered upon any Exclusive Use Area or Common Area nor shall the exterior of any Living Unit be changed or altered unless the ARC has reviewed and approved the changes in accordance with the guidelines." (Bold and italics omitted.) The Guidelines contain an "Architectural Concept" section that explains that Association's architecture is a homogenous Spanish style reminiscent of California early days, and minor architectural changes may be considered that maintain the integrity of that architectural style. According to the Guidelines, "[a]reas allowing the largest

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altered upon any Yard Exclusive Use Area or the exterior of any Living Unit until the location and the complete plans and specifications thereof (including the color scheme of each building, fence and/or wall to be erected) have been approved in writing by the ARC. The ARC shall provide guidelines for the submission of plans and specifications which may be amended by the ARC from time to time. Failure to comply with the requirements for ARC approval shall be deemed sufficient basis for the ARC to refuse to review the submission . . . . No alteration shall be made in the exterior color design or openings of any building or other construction unless written approval of said alteration shall have been obtained from the ARC. . . ."

possibility for individual expression are the Exclusive Use Areas appurtenant to the rear of such Living Unit and intended for the exclusive use of its inhabitants. [¶] These areas are actually Common Areas and shall be landscaped and maintained by the home owner." (Bold and italics omitted.) The CC&Rs define the exclusive use areas.

Before January 2007, Association's architectural review committee had a policy of maintaining a dark shade of brown color for windows that generally faced the street within the community, other than the garage windows. The committee had a different policy with respect to windows that did not face the street. The Stantons were aware of this policy since at least 1999, when the existing architectural review committee denied their application to install sandtone colored windows due to the color variation.

In January 2007, the members of the architectural review committee met with the Stantons at their property and explained that their window color was unacceptable. On January 31, 2007, Association advised the Stantons by letter that their application had been disapproved because, among other deficiencies, the window frame color specified on the application was incorrect. In February 2007, the Stantons submitted two additional applications again requesting approval of sandtone colored windows.

The following month, the Association's manager on the Board's behalf advised the Stantons that the architectural review committee had denied their application "because the casement windows must be brown in color." In April 2007, Thomas Stanton wrote to Association's legal counsel and, among other things, accused the architectural review committee of acting in an arbitrary and capricious manner in its color approvals. At the

conclusion of the letter, he wrote, "New non-standard color windows will be installed in our home this week!" The Stantons thereafter installed the sandtone-colored windows.

In May 2007, Association offered to resolve the dispute with the Stantons through mediation in accordance with Civil Code section 1369.520. The Stantons declined mediation.

Association thereafter filed a verified complaint against the Stantons containing causes of action for declaratory and injunctive relief based on the Stantons' violation of the CC&Rs. It sought a permanent injunction requiring the Stantons to modify their windows by painting them a color approved by the architectural review committee, or alternatively requiring them to remove and replace the existing windows with windows in an approved color after submitting plans and specifications under the Guidelines and obtaining the committee's approval. It also sought a judicial declaration of the rights, duties and obligations of the parties under the CC&Rs pertaining to the Stantons' unit and an order directing them to comply with all other provisions of the CC&Rs. Association prayed for costs and attorney fees.

The matter proceeded to a bench trial, after which the trial court issued a written statement of decision determining Association to be the prevailing party. The court made detailed legal and factual findings in part as follows:

"The Association has maintained a color scheme with approved and recommended colors for windows in the community, which is reflected in Exhibit 21. . . . [T]he Association's Architectural Guidelines . . . reference[] the general policy with respect to the ARC and the standards to be maintained within the community. . . . [¶]

. . . [T]he color to be applied to the exterior surfaces of the building are included and controlled by both the CC&Rs and derivatively by the Architectural Guidelines . . . . [¶] . . .

". . . The windows on the front of the units in Chapala are generally referred to as 'casement windows,' all of which were stained and varnished a dark shade of brown upon the original construction of the project. The Association has, over the years, consistently required that the casement windows on the front, street-facing side of the units in Chapala be brown in color, ranging from a medium to dark brown depending on whether the windows were varnished wood, painted wood, or vinyl. . . .

". . . The color the Defendants installed on the Subject Property was a lighter, gray-based earth-tone color rather than a medium to dark brown that the Association had previously approved. This color is substantially different from the otherwise uniform look of the windows which had been installed in the community. Lighter colored windows have over the years been allowed by the Association for windows located in the rear or side of units. No such window colors have been ARC-approved in areas where the Defendants have installed their windows. On one residence, the Finneran home, there is a slightly lighter shade of brown that was approved. This approval was not so inconsistent with the prior policy to constitute any bar to the Stanton rejection by the ARC. [¶] . . .

". . . [T]he Association may validly permit for color approval differences between the generally front-facing doors and windows and those that generally face the rear and are contained in what has been described in the testimony and exhibits in this matter as

the 'exclusive use common area.' These different standards, as applied to those generally-accepted areas, are neither arbitrary nor capricious, in fact or as applied. To the extent that the Finneran windows were approved in a lighter shade than what has been described as 'bison' brown, such prior approval is not such that the Stanton disapproval was arbitrary, capricious or discriminatory. . . .

"A presumption of reasonableness exists as to the enforcement of restrictions in common interest developments such as Chapala Management Corporation. . . . The provisions in the CC&Rs dealing with architectural approval are presumed reasonable. The Court finds that the architectural provisions included in Article XV, Section 2 of the CC&Rs do not violate any public policy, and are not internally arbitrary. The purpose of the CC&Rs [is] in part for enhancing and perfecting the value, desirability, and attractiveness of the property. The CC&Rs and the requirements contained therein are enforceable as to the residents of the Association, including the Defendants.

"The applicable provisions of the CC&Rs require that Defendants obtain the approval of the ARC before making any architectural modifications to the Subject Property. Defendants in this instance breached the CC&Rs by installing the sandtone windows at the Subject Property after they received express, written disapproval of their application from the ARC. Defendant Thomas Stanton testified that he knew at the time of the installation that he was violating the CC&Rs by what he did, but felt that he was violating them with what he considered to be good cause.

"The ARC acted within the scope and power granted by the CC&Rs in disapproving the Defendants' architectural application for the installation of the sandtone

windows. The standard for the ARC's approval or disapproval of architectural application, as set forth in Article XV, Section 11 of the CC&Rs, requires the ARC to make those decisions on the basis of aesthetic considerations and the overall benefit or detriment which would result to the immediate vicinity of the Project, generally taking into consideration the aesthetic aspects of the color schemes. This does not mean, nor should it be interpreted to imply, that each decision of the ARC solely involves the neighbors in the immediate vicinity of the affected property, nor is a plebiscite intended on each and every disputed call that is made by the ARC.

"The disapproval in this instance constituted an extension of a longstanding architectural aesthetic color scheme as applied to the homes in the Association and was not arbitrary or capricious as applied to any portion of the community (including the Stanton home), nor did it violate any public policy. . . .

"Decisions made by an architectural committee to approve or deny architectural applications may be based on the subjective judgment of those entities as reasonably applied and as reviewed from time to time by the board of directors of an association. The ARC in this case was empowered to make decisions on architectural applications on the basis of aesthetic considerations. The ARC acted within its scope of discretion provided under the CC&Rs in disapproving the Defendants' application for sandtone windows based on a longstanding color scheme that has been substantially followed throughout the existence of the Association.

". . . [T]he ARC completed a reasonable investigation by meeting with the Defendants to discuss the color of the windows, and by comparing the sandtone windows

to the Association's paint standards for similarly situated windows in Chapala. . . . Exhibit 21 . . . was acknowledged in correspondence by Mr. Stanton to have been the color standards of the Association, of which he was in possession . . . and [of which he] had knowledge . . . . [T]he colors set forth in Exhibit 21 represent a reflection of the approved color standard with respect to garage doors, street-facing windows and other applicable structures within the community and served as a guide available to the homeowners for those colors that were considered appropriate for replacement windows, replacement garage doors and/or repainting existing structures in the community as necessary."

The court entered judgment in Association's favor. It ordered the Stantons to modify their sandtone windows by painting them a color approved by the ARC or alternatively remove and replace them with windows of an approved color, after submitting plans and specifications to the ARC under its guidelines and obtaining its approval. It granted Association the right to enter the property to modify the windows if the Stantons failed to comply with specified time deadlines for the above acts. It ordered Association to recover its reasonable attorney fees with interest and costs.

Thereafter, Association moved for an award of $83,027.50 in attorney fees and $4,298.72 in costs as the prevailing party in the matter. In part, it argued its action was one to enforce the CC&Rs and obtain declaratory relief for the Stantons' breach of the CC&Rs, and thus Civil Code section 1354 as well as article XIX, section 5 of the

CC&Rs[3] entitled it to recover its reasonable attorney fees. The Stantons opposed the motion on grounds Association was not entitled to fees under Civil Code section 1354 because its action was not one to enforce any specific provision of its governing documents. They further argued Association's action was at most a limited civil case because damages were well below $25,000, and thus it was controlled by Code of Civil Procedure section 1033, limiting Association's recovery to its actual cost of the filing fee and service of process. Finally, the Stantons argued Association did not demonstrate its claimed attorney fees were reasonable.

The trial court granted Association's motion in part, awarding it $59,122.50 in attorney fees and $4,298.72 in costs. The court pointed out it had already ruled Association's action was one to enforce express provisions in its CC&Rs, the action was not a limited civil case as it contained a cause of action for injunctive relief, and the hourly rates of Association's counsel were reasonable. Association filed a motion for an undertaking to stay enforcement of the $63,421.22 judgment and the Stantons moved to stay all costs, including attorney fees, pending resolution of the appeal. The trial court tentatively granted the Association's motion, finding attorney fees were not an ordinary or routine cost such that an undertaking is required. It granted the Stantons' motion in part, staying collection of "ordinary" costs only. The Stantons filed a petition for writ of

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[3] Section 5 of article XIX of the CC&Rs, entitled "Litigation," provides: "In the event the Association, Community Center, or any Owner shall commence litigation to enforce any of the covenants, conditions or restrictions herein contained, the prevailing party in such litigation shall be entitled to costs of suit and such attorney's fees as the Court may adjudge reasonable and proper. The 'prevailing party' shall be the party in whose favor a final judgment is entered."

mandate, supersedeas or other appropriate relief, contending no undertaking was required and asking us to stay the trial court's order. We issued an immediate stay of the order requiring an undertaking and ordered that the writ be considered with the Stantons' appeal from the judgment and postjudgment order awarding attorney fees and costs.

DISCUSSION

I. *Propriety of Injunctive Relief*

Pointing out that an injunction may be granted only when the plaintiff has no adequate remedy at law, the Stantons contend Association had two specific and adequate legal remedies in its CC&Rs to enforce unauthorized additions or changes to a unit's exterior. They argue that under article XV, section 4 of the CC&Rs, the Association could remedy the violation and collect its costs for doing so in an action at law. The Stantons maintain Association's remedy for noncompliance was to remove the noncomplying improvement or remedy the noncompliance, assess the owner for the cost, and collect any unpaid assessment by an action at law in small claims court. Alternatively, they argue that under the CC&Rs, their nonstandard windows were deemed approved because the architectural review committee did not timely notify them of any discrepancy after the Stantons advised it they were completing work "for which approved plans are required. . . ."

In response, Association argues the Stantons did not raise these arguments in the trial court other than by demurrer (to argue the superior court lacked subject matter jurisdiction), and we should disregard them as "beyond the scope of this appeal." Association also attacks these arguments on their merits. It maintains article XV, section

4 of the CC&Rs gives it the right and authority, but not the duty, to enter a unit owner's property and correct a violation. It contends it retains the option under the CC&Rs to pursue any legal remedy to gain compliance with the CC&Rs, including by "appropriate proceedings in law or equity." It further argues the Board exercised its business judgment to file suit to enforce its governing documents; that its decision as to what enforcement method to pursue under a given circumstance is entitled to deference because it is a decision made in good faith to further the purpose of the Association, is consistent with the Association's governing documents, and complies with public policy. Finally, Association sets forth various reasons why the Stantons' unauthorized installation of their windows was not deemed approved under the CC&Rs.

A. *Standard of Review*

As we have explained, the Stantons bear the burden of overcoming the presumption that an appealed judgment or order is correct. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, 1121 (*Ekstrom*).) "Generally, the trial court's decision to grant or deny [declaratory or injunctive relief] will not be disturbed on appeal unless it is clearly shown its discretion was abused." (*Ibid*.) " 'A decision will be reversed for an abuse of discretion only when it exceeds the bounds of reason or disregards uncontradicted evidence. [Citation.] The burden rests with the party challenging an injunction to make a clear showing of abuse.' " (*Clear Lake Riviera Community Assn. v. Cramer* (2010) 182 Cal.App.4th 459, 471.)

Where the decisive underlying facts are undisputed, we are confronted with questions of law in reviewing the propriety of the trial court's decision to grant relief.

(*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974 (*Dolan-King I*); see *Ekstrom*, *supra*, 168 Cal.App.4th at p. 1121.) To the extent our review of the judgment involves an interpretation of the CC&Rs, that too is a question of law we address de novo. (*Dolan-King I*, at p. 974; *Ekstrom*, at p. 1121.)

B. *Association's CC&Rs and Interpretation*

We set out the relevant provisions of the CC&Rs.

Article XV of the CC&Rs pertains to the architectural review committee. In part, it states, "[n]o alteration shall be made in the exterior color design or openings of any building or other construction unless written approval of said alteration shall have been obtained from the ARC." (CC&Rs, art. XV, § 2.) That section also generally prohibits the erection, placement or alteration of any building, structure or improvement on any unit exterior until the ARC approves in writing the location and the complete plans and specifications of those matters, including the color scheme.

Article XV, section 4 provides: "In the event of the failure of any individual Owner to comply with a written directive or order from the ARC, then in such event, the ARC shall have the right and authority to perform the subject matter of such directive or order, including, if necessary, the right to enter upon the Yard, Living Unit or where a violation of these restrictions exists, and the cost of such performance shall be charged to the Owner of the Condominium in question, which cost shall be due within five (5) days after receipt of written demand therefor, and may be recovered by the ARC in an action at law against such individual Owner."

Article XV, section 6 of the CC&Rs sets forth a procedure for the "[i]nspection of work and correction of defects therein . . . ." It provides: "(a) Upon the completion of any work for which approved plans are required under this Article, the Owner shall give written notice of completion to the ARC. [¶] (b) Within ninety (90) days thereafter, the ARC or its duly authorized representative, may inspect such improvement. [I]f the ARC finds that such work was not done in substantial compliance with the approved plans, it shall notify the Owner in writing of such noncompliance within such ninety (90) day period, specifying the particulars of noncompliance, and shall require the Owner to remedy the same. [¶] . . . [¶] (d) If for any reason the ARC fails to notify the Owner of any noncompliance within ninety (90) days after receipt of said written notice of completion from the Owner, the improvement shall be deemed to be in accordance with said approved plans."

Article XVIII of the CC&Rs contains the declaration's enforcement provisions. Sections 3, 4 and 5 of that article read as follows: "Any breach hereof which is not cured within fifteen (15) days after notice is mailed to the party alleged to be in breach, may be enjoined, abated or remedied by appropriate proceedings in law or equity. It is hereby agreed that damages at law are inadequate for any non-monetary breach hereof. [¶] . . . The results of every act or omission which are a breach hereof are hereby declared to be and constitute a nuisance, and every remedy allowed by law or equity against a nuisance, either public or private, shall be applicable against every such result and may be exercised by any party enforcing this Declaration. [¶] . . . The remedies herein provided

for breach of the covenants contained in this Declaration shall be deemed cumulative, and none of such remedies shall be deemed exclusive."

The CC&Rs further state that each owner shall comply with the provisions of the CC&Rs, Bylaws, and Association's decisions and "failure to comply with any such provisions, decisions or resolutions shall be grounds for an action to recover sums due for damages or for injunctive relief."

"CC&R's are interpreted according to the usual rules for the interpretation of contracts generally, with a view toward enforcing the reasonable intent of the parties. [Citations.] Where, as here, the trial court's interpretation of the CC&R's does not turn on the credibility of extrinsic evidence, we independently interpret the meaning of the written instrument. [Citation.] [¶] The language of the CC&R's governs if it is clear and explicit, and we interpret the words in their ordinary and popular sense unless a contrary intent is shown. [Citations.] The parties' intent is to be ascertained from the writing alone if possible. [Citation.] If an instrument is capable of two different reasonable interpretations, the instrument is ambiguous. [Citation.] In that instance, we interpret the CC&R's to make them lawful, operative, definite, reasonable and capable of being carried into effect, and must avoid an interpretation that would make them harsh, unjust or inequitable." (*Harvey v. The Landing Homeowners Assn*. (2008) 162 Cal.App.4th 809, 817-818, fns. omitted.)

C. *Analysis*

Given the applicable standard of review, the question for this appeal is not whether the CC&Rs provide Association with a remedy at law — they plainly do — it is whether

the trial court abused its discretion in awarding Association injunctive relief under the present circumstances. We will find an abuse of discretion if the Association's governing documents mandate an *exclusive* legal or self-help remedy. They plainly do not. (See CC&Rs, art. XVIII, § 5 [none of the remedies provided for in the CC&Rs shall be deemed exclusive].) We may also conclude the trial court abused its discretion in awarding injunctive relief if such relief is otherwise unavailable to Association as a matter of law, or the court's decision to award such relief under the present circumstances exceeds the bounds of reason or has no reasonable basis. (*Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.)

We cannot say the trial court's decision to grant Association injunctive relief falls within this difficult standard. This court recently explained — in the context of a trial court's denial of injunctive relief to a condominium unit owner — that " ' "[a] permanent injunction is a determination on the merits that a plaintiff has prevailed on a cause of action . . . against a defendant and that equitable relief is appropriate." [Citation.] . . . The [court's] exercise of discretion must be supported by the evidence and, "to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, [we] review such factual findings under a substantial evidence standard." [Citation.] We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all reasonable inferences to support the trial court's order.' " (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 872.) Where minds may reasonably differ, it is the trial judge's

discretion and not that of the appellate court that must control. (See *Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 931.)

Here, the trial court found that the Stantons breached the Association's CC&Rs by installing exterior windows in their unit without obtaining prior architectural review committee approval. The documentary evidence and Thomas Stanton's trial testimony support the trial court's factual determinations that the Stantons intentionally proceeded with the unauthorized window installation in the face of the architectural review committee's rejection of their application. The CC&Rs expressly deem damages at law an inadequate remedy for such a nonmonetary breach, and they expressly permit the Association to seek injunctive relief to remedy any such violation. (CC&Rs, art. XVIII, § 3.) Injunctive relief is an authorized means to enforce covenants and restrictions on land. (Civ. Code, § 1354, subd. (a);[4] *Terifaj*, *supra*, 33 Cal.4th at pp. 78-79 [section 1354, subdivision (a) permits an association to enforce all original and amended covenants and restrictions via equitable remedies, including injunctive relief, unless they

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4 Civil Code section 1354, subdivision (a) provides: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both." On appeal, the Stantons do not challenge the reasonableness of the provision in Association's CC&Rs requiring prior architectural review committee approval of improvements. Such restrictions are presumed to be reasonable and are enforceable unless they are arbitrary. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 386 (*Nahrstedt*); *Villa De Las Palmas Homeowners Assn.v. Terifaj* (2004) 33 Cal.4th 73, 86-88 (*Terifaj*).)

are unreasonable]; *Arrowhead Mut. Service Co. v. Faust* (1968) 260 Cal.App.2d 567, 572-573, 582.)

We will also infer a finding by the trial court that it was within the Board's reasonable discretion to file suit and pursue the equitable remedy of injunctive relief. (See *Haley v. Casa Del Rey Homeowners Assn.*, *supra*, 153 Cal.App.4th at p. 875 [extending rule of judicial deference to association decisions to decisions how to remedy violations of CC&Rs]; *Harvey v. The Landing Homeowners Assn.*, *supra*, 162 Cal.App.4th at p. 821, fn. 5.) "Generally, courts will uphold decisions made by the governing board of an owners association as long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374.) The Board's decision should be "judged in light of the facts at the time the board considered the matter." (*Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 866; see also *Ekstrom, supra,* 168 Cal.App.4th at p. 1126.) We must uphold the trial court's finding on that issue as long as the evidence supports a finding that the Board's discretion was exercised in good faith in what it believed was in the best interests of the Association, in a manner consistent with the development's governing documents and in compliance with public policy. (See *Nahrstedt*, at p. 371; *Haley*, at p. 875.)

The trial court found, on disputed evidence, that the architectural review committee completed a reasonable investigation concerning the dispute by meeting with the Stantons to discuss their window color, and by comparing the sandtone windows to

the Association's paint standards for similarly situated windows. The Stantons do not challenge that finding. The evidence further shows that, in the face of the Stantons' willful violation of the prior approval provision of the CC&Rs, Association unsuccessfully sought to resolve the matter through mediation. Because the Stantons showed no indication of modifying their windows or otherwise changing their position, the Board thereafter elected to file suit to have the Stantons remedy their unauthorized improvements. Under the CC&Rs, Association has discretion to select among several means for remedying violations, including by bringing an action to require the Stantons to cure the violation by mandatory injunction. (Accord, *Haley v. Casa Del Rey Homeowners Assn.*, *supra*, 153 Cal.App.4th at p. 875 [holding the association had the discretion to address complaints about CC&R violations by amending the CC&Rs to permit certain encroachments rather than file expensive and time-consuming litigation].) The architectural review committee is granted broad authority under the CC&Rs to maintain the architectural and aesthetic integrity of Association, and under that authority it concluded that the Stantons' unapproved windows could not remain without compromising that integrity. Under the circumstances, it was not manifestly unreasonable for the trial court to conclude, implicitly, that Association felt the interests of its members would be best served by obtaining a court order directing the Stantons to bring their windows in compliance with the Association's "longstanding, architectural aesthetic color scheme."

Because we are limited to determining whether the trial court's decision to grant injunctive relief is an abuse of discretion, we shall not overturn its decision in view of the

above-summarized factual circumstances and grant of authority under the CC&Rs. We note, however, that were we to consider the matter de novo, we would question the Board's business judgment in resorting to expensive and time-consuming litigation generating many thousands of dollars in legal fees, rather than electing to notify the Stantons of their violation and issue a directive that they paint or replace their windows with windows of an approved color. (CC&Rs, art. XV, § 4.) If the Stantons did not comply, Association would have been reasonably within its authority to remedy the Stantons' noncompliance by painting the two windows, charging the Stantons its expenses incurred in doing so, and recovering the minimal cost in an action at law. (CC&Rs, art. XV, § 4.) Under the abuse of discretion standard of review, however, our difference of opinion does not warrant reversal as long as we conclude the trial court could reasonably reach a different conclusion.

Turning to the Stantons' claim that their windows were deemed approved by Association, we agree with Association that the Stantons forfeited this theory — which is based on an underlying factual premise that they notified Association of the completion of their window installation — by failing to raise it in the trial court. " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus, 'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived.' " (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.) "Appellate courts are loath to reverse a judgment on grounds that the opposing party did

not have an opportunity to argue and the trial court did not have an opportunity to consider." (*JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178.)

We have reviewed the Stantons' trial brief, the closing arguments of their counsel, and their request for a statement of decision, and find nothing suggesting that they sought a finding from the trial court that their windows — as installed — were deemed approved under the inspection and correction provisions of article XV, section 6(d) of the CC&Rs by Association's failure to give written notice of noncompliance.[5]

Nor are we convinced that the Stantons' windows were deemed approved as a matter of law. (See *Hale v. Morgan* (1978) 22 Cal.3d 388, 394 ["a litigant may raise for the first time on appeal a pure question of law [that] is presented on undisputed facts"]; see also *Stone Street Capital, LLC v. California State Lottery Commission* (2008) 165 Cal.App.4th 109, 123, fn. 10.) First, we cannot say the relevant facts are undisputed. The evidence shows that the Stantons notified Association that they would be installing their windows "this week." The trial court could reasonably conclude, and we must infer it found, the Stantons' letter did not constitute "written notice of completion" to the

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[5] The Stantons' trial brief states in part that the evidence would show the Association "denied the color, but not the windows or the installation of the defendants' windows." In his closing argument, the Stantons' trial counsel argued that the Stantons' window installation was approved because the architectural review committee only disapproved the *color*, not the type of window and manner of installation. He argued, "[W]e know that the code sections require that when the disapproval is given they have to identify all of the reasons, they only identified color reason [*sic*]. As a result of that, your Honor, by virtue of not disapproving the windows and the installation, they became approved automatically by the passage of time, and I believe that is 60 days [*sic*]."

Association within the contemplation of the CC&Rs. (CC&Rs, art. XV, § 6(a).) But were we to consider the matter assuming the facts were undisputed, we would reject the contention. The language of the inspection and correction provision requiring written notice of completion presumes the owner has "approved plans" (CC&Rs, art. XV, § 6(a)) for the improvement or work. Thus, in those cases, the owners will have commenced the work with architectural review committee approval. The purpose of requiring a notice of completion is to permit — but not require — the architectural review committee to inspect (". . . the ARC *may* inspect . . .") the work or improvement to decide whether it complies with the approved plans, and give a notice of noncompliance if it does not. These inspection and correction provisions are not applicable to the Stantons, who installed their windows *without* approved plans. Indeed, they did so in the face of the prior architectural review committee disapproval. Section 6(d) of article XV does not govern.

II. *Board Hearing*

The Stantons contend the trial court ignored statutory requirements in Civil Code section 1378, subdivision (a)(4) and (5) that the Board grant them a reconsideration hearing after the architectural review committee denied their application. They argue "[n]othing in this record indicates that [Association] ever offered the Stantons a board hearing or even notified them of the availability of one." They assert Association was not authorized to pursue litigation as a result of its failure to follow its own procedures, and on this basis they ask this court to reverse the judgment and remand it to enter judgment in their favor.

Association responds that the record shows the Stantons were well aware of such an appeal process because each year, it provided the homeowners with a document entitled "Architectural Review Committee and and/or [*sic*] Board Standards and Procedures." Association also points out the trial court made an express finding in its statement of decision that it had complied with all requirements and conditions of its CC&Rs, and if there were deviations, the parties, who were represented by counsel, waived them.[6] Association argues the finding is supported by substantial evidence that it complied with procedural prerequisites of filing suit, including conducting a board meeting to discuss the architectural review committee's decision on the Stantons' application.

Civil Code section 1378 governs an association's decisionmaking process if its governing documents, as Association's do here, require it to approve or disapprove an owner's request to make a physical change to his or her unit or to the common area. (Civ. Code, § 1378, subd. (a).) The statute requires the association have a "fair, reasonable, and expeditious" procedure for making its decision, which must be made in good faith and may not be unreasonable, arbitrary or capricious. (Civ. Code, § 1378, subd. (a)(1), (2).) Civil Code section 1378, subdivision (a)(4), provides: "A decision on a proposed change shall be in writing. If a proposed change is disapproved, the written decision

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6 The trial court found: "The Association has substantially complied with or performed all acts, services, and conditions required by the CC&Rs to be performed. The Court finds that in connection with the pre-filing conduct of the parties that both parties retained counsel prior to the filing of the instant litigation, and to the extent that there is any deviation from otherwise required procedural prerequisites, those procedural prerequisites have effectively been waived by the parties."

shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board of directors." Civil Code section 1378, subdivision (a)(5), provides: "If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors of the association that made the decision, at an open meeting of the board." Reconsideration of the decision is not required if the board and the body making a decision on a proposed change are one and the same, and the decision is made at an open meeting. (*Ibid*.)

Association does not dispute the mandatory language of Civil Code section 1378, subdivision (a)(4) stating the decision of disapproval "shall include" a description of the procedure for reconsideration of the decision by the Board. There is no evidence that Association met this requirement. However, we nevertheless reject the Stantons' contentions for several reasons. First, they do not explain how or at what point below they raised the issue of the Association's noncompliance with this requirement in the trial court, to give the court the opportunity to address it. Having failed to demonstrate they raised the issue below, they have forfeited any possible claim on appeal relating to this error. (See generally *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265 [purpose of the general doctrine of forfeiture is to encourage a defendant to bring errors to the attention of the trial court so that they may be corrected or avoided and a fair trial had].)

Second, even if the trial court somehow erred by "ignoring" Civil Code section 1378's requirements, the Stantons have not met their burden to affirmatively establish they were prejudiced by the error. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82; *Paterno v. State of California*

(1999) 74 Cal.App.4th 68, 105 [appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice].) Specifically, they have not attempted to demonstrate that the outcome of this matter would be different if the trial court had acknowledged the notice requirement.

Nor can they make such a showing, in our view. The record reflects that after the Stantons' December 2006 application was denied by the architectural review committee, Thomas Stanton wrote to the Board via its property manager stating he had consulted with an attorney, who had advised him the architectural review committee's action was arbitrary, capricious and an abuse of discretion. He asked that the Board consider certain information and "reconsider our color request . . . ." (Underlining omitted.) Mr. Stanton admitted at trial he sent the letter for the purpose of obtaining the Board's reconsideration; that he believed the Board had the right to overrule the architectural review committee's decision based on information related to him by the prior chairman of the architectural review committee. The property manager responded in part by advising Mr. Stanton that the Board had received his letter and would discuss it at its February 15, 2007 meeting, stating the time of that meeting. Mr. Stanton acknowledged the upcoming Board meeting in writing and advised the property manager that he could not attend due to a conflict. He asked instead for a written response to the questions and statements within his letter.

Thus, despite the absence of express written notification about appeal or reconsideration rights in the architectural review committee's December 2006 denial, the record shows the Stantons in consultation with legal counsel nonetheless exercised those

rights, specifically asking the Board for reconsideration of the architectural review committee's decision, and they were given an opportunity to attend the Board meeting. Further, this evidence supports the trial court's findings that to the extent the architectural review committee did not include written notice of the Stantons' right to Board reconsideration in its decisions, the Stantons knew of, but waived, any deficiency and Association's noncompliance by failing to raise it at the time.

III. *Association's Paint Policy*

The Stantons contend the trial court erred by holding the term "aesthetic" allows Association to depart from its governing documents, which assertedly require all exterior replacement windows be "chocolate brown" in color without regard to location. They argue the CC&Rs and Exhibit 21, reflecting what they characterize as Association's written "regulation" for paint schemes, contradict Association's policy of allowing differing colors for street-facing and non-street-facing windows, and that any such unwritten policy based on window location is not a valid operating rule under Civil Code section 1357.110, subdivision (a). According to the Stantons, the ARC chairman was not authorized to allow variations in exterior window color at the Association depending on their location; any such variations were unauthorized and capricious "by definition" because they were based on some unwritten, nebulous standard.

The Stantons do not challenge the sufficiency of the evidence of the trial court's findings concerning the architectural review committee's window color policy, i.e., that since 1999, the Stantons had knowledge that the architectural review committee had an architectural guideline permitting window colors to differ depending on whether or not

they faced the street. They therefore concede, as the trial court found, the architectural review committee has been operating under such a policy since at least 1999. The Stantons appear to argue only that the policy is unenforceable or void because it is unwritten, contradicts the CC&Rs and Exhibit 21, and is arbitrary and capricious because it was implemented and controlled at the whim of the architectural review committee's chairman.

Preliminarily, we observe the Stantons do not explain how these arguments compel reversal of the trial court's judgment. Even if we assume their argument to be true — that the Association's architectural review committee could not validly permit owners to install anything other than chocolate brown-colored exterior windows (no matter the location) and the trial court erred in finding otherwise — the Association's lawsuit was directed at the Stantons' violation of that standard when they installed sandtone-colored exterior windows without architectural review committee approval. The Stantons do not challenge or dispute the CC&Rs provisions requiring prior architectural review committee approval of improvements. As Association points out, the trial court determined the Stantons had breached the CC&Rs by installing their sandtone-colored windows without architectural review committee approval, and that the architectural review committee acted within the scope and power granted it by the CC&Rs in disapproving their chosen windows, which were not the brown color specified in Association's window paint standards.

Accordingly, on these points, the Stantons cannot meet their appellate burden of affirmatively demonstrating prejudice, that is, that the trial court's assumed error in its

findings was prejudicial or resulted in a miscarriage of justice. " '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

The Stantons' arguments mischaracterize the trial court's findings in any event. The court did not find that the architectural review committee was authorized to ignore the Association's governing documents. It found the Association's CC&Rs granted discretion to the architectural review committee in reviewing requests for improvements on the basis of aesthetic considerations, which is a delegation of power allowed under California law. As we have stated, courts review such broad grants of authority under a deferential standard: they are "presumptively reasonable [citation], and are enforceable 'unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit' [citation]." (*Terifaj*, *supra*, 33 Cal.4th at p. 88; *Nahrstedt*, *supra*, 8 Cal.4th at pp. 380, 382.) The court also found that Exhibit 21 reflected "approved and *recommended* colors for windows in the community," (italics added) that Exhibit 21 served as a "guide" for the homeowners, and that the architectural review committee had discretion, in its exercise of aesthetic judgment, to allow for differences in color for front-facing windows and those windows that generally face the rear of the units, in areas described as exclusive use common area. The court's finding is consistent with Association's architectural guidelines, which allow for the "largest possibility for individual expression" within the exclusive use areas appurtenant

to the units' rears, i.e., non-street-facing.

The grant of discretion to the ARC in article XV, section 11 of the CC&Rs, is not "wholly arbitrary" because it bears a "rational relationship to the protection, preservation, operation[, and] purpose of the affected land." (*Nahrstedt, supra,* 8 Cal.4th at pp. 381-382.) As we have previously held, "Maintaining a consistent and harmonious neighborhood character, one that is architecturally and artistically pleasing, confers a benefit on the homeowners by maintaining the value of their properties." (*Dolan-King I, supra,* 81 Cal.App.4th at p. 976.) Here, the architectural review committee could reasonably conclude within the broad authority granted to it in the CC&Rs that Chapala's neighborhood character and aesthetics required that street or common area-facing windows be a consistent shade of brown, so as to avoid a hodgepodge of differing colors apparent from the unit fronts.

IV. *Sufficiency of the Evidence*

In related arguments, the Stantons contend the trial court erred in finding that the architectural review committee did not act in an arbitrary, capricious or discriminatory manner in disapproving their application. Summarizing trial testimony from various witnesses that other windows in Chapala were painted with lighter colors, as well as from Association's chairman of the architectural review committee, they argue the architectural review committee's rejection of their windows was arbitrary, illegal and capricious because it was the result of a decision made solely by the architectural review committee chairman based on the Association's lawyers' conception of Association's "signature" look, it was "subject to his will without restriction," and it was contrary to Association's

unrecorded color regulations, which the Stantons argue are binding upon owners having notice of those regulations. They argue the decision was discriminatory because the architectural review committee chairman treated other owners differently, specifically, the evidence showed one other owner — Brian Finneran — had been allowed to install sandtone-colored windows in the front of his unit.

A. *Standard of Review*

" 'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' " (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, superseded by statute on another ground as noted in *Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 100.) " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citation.] 'Substantial evidence . . . is not synonymous with "any" evidence.' Instead, it is ' " 'substantial' proof of the essentials which the law requires." ' [Citations.] The focus is on the quality, rather than the quantity, of the evidence. 'Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial." ' [Citation.] Inferences may constitute substantial evidence, but they must be the product of logic and reason.

Speculation or conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

B. *Analysis*

We begin our analysis by pointing out that the Stantons have arguably waived their sufficiency of the evidence arguments by failing to summarize all of the material evidence, including the evidence that is damaging to their case. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409-410; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 8:71, p. 8-34.) Indeed, the Stantons largely reargue the merits of their case — they discuss why the architectural review committee's decision was arbitrary, capricious and discriminatory without analyzing the entirety of the trial evidence and the trial court's factual findings. By ignoring the trial court's adverse factual findings and failing to analyze why the evidence does not support those findings, and by restricting their analysis and argument to facts that assertedly support their position — i.e., evidence that other owners were permitted to install lighter colored windows in their homes — the Stantons ignore the settled principles of substantial evidence review that we have set forth above.

Setting aside this fatal flaw, we are unpersuaded by the Stantons' arguments on the merits. Generally "[w]hether conduct was arbitrary and capricious is a question of fact within the sound discretion of the trial court." (*Zuehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 Cal.App.4th 249, 255-256.) However, as stated above, where the facts

are uncontroverted we apply a de novo standard of review. (*Dolan-King I, supra*, 81 Cal.App.4th at p. 974.)[7]

The Stantons' evidentiary challenge is in part based on an incorrect premise: that Association's unrecorded exterior window color standards as reflected in Exhibit 21 are "rules" or equitable servitudes that bind the architectural review committee for purposes of all exterior windows at the Association, rather than a recommendation or "guide for homeowners" as the trial court found. As recommendations or guides, the color standards are subject to the architectural review committee's subjective views and aesthetic judgment that may be exercised in accordance with Association's architectural guidelines, which allow for more "individual expression" in the exclusive use areas. The Stantons do not contest the trial court's factual finding — set out verbatim above — that the Association had maintained a longstanding policy at Chapala (at least since 1999) of requiring street-facing windows to be a darker brown color, but allowing owners to use lighter colors on other, non-street-facing windows. There is no evidence suggesting the presence of lighter colored windows at Chapala was the result of "invented exceptions"

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7 Citing *Dolan-King I, supra*, 81 Cal.App.4th 965, Association argues the Stantons bore the burden of proof at trial to make a showing that the architectural review committee's decision to deny their window application was arbitrary and capricious. However, *Dolan-King I* involved a *homeowner's* lawsuit for declaratory and injunctive relief. (*Id*. at p. 979 ["Having sought a declaration that the Art Jury and Board imposed restrictions unreasonably and arbitrarily, it was Dolan-King's burden at trial to make that showing before the trial court"].) Here, Association sued the Stantons to enforce its CC&Rs, and thus it bore the burden of showing it had followed its own standards and procedures prior to pursuing its remedy, its procedures were fair and reasonable, and its substantive decision was made in good faith, and was reasonable, not arbitrary or capricious. (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [citing cases].)

by the architectural review committee chairman, as the Stantons assert. We conclude as a matter of law that it was not arbitrary, capricious or discriminatory for the architectural review committee to reject the Stantons' request for sandtone-colored front-facing windows and at the same time permit other owners to have lighter colored windows in the portions of their units facing exclusive use areas. Such decision is in keeping with Association's longstanding policy, its architectural guidelines, and the architectural review committee's broad grant of discretionary authority under the CC&Rs.

Second, there is no evidence suggesting, as the Stantons maintain, that the architectural review committee chairman alone made the decision to deny their window application. The evidence in fact is to the contrary. Peter Masters was the architectural review committee chairman during the time the Stantons submitted their window applications in 2006 and 2007. At trial, he testified he was appointed chairman in 2005 by the Board and served with two other members, Eleanor Levi and Robert Balmet. Masters testified that the architectural review committee was vested with the decisionmaking process in maintaining the Association's originally-established architectural integrity, and that committee was called upon to make subjective judgments about color and design. According to Masters, the committee considered the Stantons' December 2006 window application and after denying it on grounds it did not match the color of other similar windows in Chapala, all three committee members met with the Stantons to explain the architectural review committee's conclusion. The trial court could reasonably infer from this evidence that the committee collectively decided to deny the

Stantons' application. To the extent the Stantons presented contrary evidence, it is of no consequence on our review for substantial evidence.

The Stantons make much of the fact that their expert, an Anderson window representative, identified the Finneran home's front windows as sandtone in color. The trial court, however, found the Finneran home had a lighter shade of brown on its windows, and also found the fact the architectural review committee had approved that window color "was not so inconsistent with the prior policy to constitute any bar to the Stanton rejection by the ARC." The Stantons would have us ignore these findings, as well as the trial testimony of Brian Finneran that his windows were "brown" colored and "much darker" than the Stantons' windows. The testimony of the Stantons' expert merely raised a conflict in the evidence that was properly resolved by the trial court. (See *People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1573 [trial court is arbiter of conflicts in testimony including expert testimony; appellate court reviews trial court's conclusion only for substantial evidence].) We will not reweigh the evidence before the trial court merely because the Stantons presented evidence that the Finneran home's windows were sandtone colored. (See *Kelly v. CB & I Constructors, Inc.* (2009) Cal.App.4th 442, 454.) The substantial evidence standard applies to both lay and expert testimony, and the trial court was free to reject the opinion of the Stantons' expert so long as it did not do so arbitrarily. (*People ex rel. Brown v. Tri-Union Seafoods, LLC*, at pp. 1567, 1568.) The Stantons do not claim, nor have they shown, that the trial court acted arbitrarily or that there is reason to reject Brian Finneran's testimony under the sufficiency of the evidence standard.

V. *Attorney Fee Award*

The Stantons do not meaningfully challenge the propriety and amount of the trial court's attorney fee award to Association. They contend that if they prevail on this appeal, Association will no longer be the prevailing party and thus the fee order should be reversed.

As this court explained in *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46 (*Dolan-King II*), an award of attorney fees under a statutory provision such as Civil Code section 1354, subdivision (f) is reviewed for abuse of discretion. Based on our foregoing conclusions, Association remains the prevailing party. Having no claim by the Stantons that the trial court abused its discretion with respect to the time expended, the hourly rate billed, or the nature of the costs assessed, we shall uphold the award. (*Dolan-King II*, at p. 46.)

VI. *Petition for Writ of Supersedeas*

A. *Contentions*

By a petition alternatively seeking a writ of mandate, supersedeas or other appropriate relief,[8] the Stantons challenge the trial court's order requiring them to post a bond or undertaking to stay execution of the costs awarded in the underlying action, including the award of attorney fees in Association's favor. They contend that under

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8 "Supersedeas" is the appropriate remedy for a refusal to acknowledge the applicability of statutory provisions automatically staying the judgment while an appeal is pursued. (*Nielsen v. Stumbos* (1990) 226 Cal.App.3d 301, 303.)

Code of Civil Procedure section 916,[9] costs in injunctive relief actions are stayed on appeal. They maintain that both authorities cited by the trial court — *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797 (*Bank of San Pedro*), and *Chamberlin v. Dale's RV Rentals, Inc.* (1986) 188 Cal.App.3d 356 (*Chamberlin*) — involved money judgments and thus the trial court misplaced reliance on them to hold that attorney fees are not ordinary or routine costs. They argue that in this case involving attorney fees awarded under the Davis-Sterling Common Interest Development Act enacted in 1985 (Civ. Code, § 1350), the trial court should have followed *Nielsen v. Stumbos*, *supra*, 226 Cal.App.3d 301.

In its opposition to the petition, Association contended the matter is governed by section 917.1, subdivision (a), which specifically requires an undertaking to stay a monetary award pending appeal. It maintained the trial court did not abuse its discretion by requiring an undertaking under its cited authorities. It further argued that this court in *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400 (*Dowling*) and the Fourth Appellate District, Division Three in *Beniwal v. Mix* (2007) 147 Cal.App.4th 621 have considered the conflict in authorities and conclude that *Bank of San Pedro*, *supra*, 3 Cal.4th 797 and *Chamberlin*, *supra,* 188 Cal.App.3d 356 are controlling on the issue of whether attorney fees are nonroutine costs requiring an undertaking. Though Association elected to concede this issue at oral argument, we will address it on the merits for the guidance of trial courts.

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9 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

B. *Legal Principles*

Section 916, subdivision (a), provides in part: "(a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order." "The purpose of the automatic stay rule is 'to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.' " (*Dowling*, *supra*, 85 Cal.App.4th at p. 1428.)

Section 917.1, subdivision (a)(2) provides an exception to the stay otherwise imposed by section 916. (*Dowling*, *supra*, 85 Cal.App.4th at p. 1428 [referring to exception as the "money judgment exception"].) Under that provision, an appeal will not stay the enforcement of a judgment or order, and thus an undertaking is required, if the judgment or order is for " '[m]oney or the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or other party to the action.' " (*Id*. at p. 1429, quoting § 917.1, subd. (a)(1).)

Section 917.1 contains another exception in subdivision (d), specifying that no undertaking is required for a judgment consisting of only costs awarded under section 1021 et seq. (*Dowling*, *supra*, 85 Cal.App.4th at p. 1430, quoting *Gallardo v. Specialty Restaurants Corp*. (2000) 84 Cal.App.4th 463, 469, fn. 5.) In *Dowling*, this court pointed out that section 917.1, subdivision (d) does not expressly refer to attorney fees awards,

but a commentator suggests that " 'a judgment solely for *attorney fees* (or [section] 1021 et seq. costs and attorney fees), when awarded pursuant to contract, *statute* or "law," should likewise be *stayed automatically on appeal* . . . because such fee awards are expressly denominated by [section] 1021 et seq. as recoverable *costs of suit*.' " (*Dowling*, at p. 1430, citing Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2009) ¶ 7:133, p. 7-34.1, citing § 1033.5, subds. (a)(10)(A), (B), (C) & (c)(5).)[10]

In *Bank of San Pedro*, *supra*, 3 Cal.4th 797, the California Supreme Court explained the longstanding rule automatically staying costs awards pending appeal: "Costs of suit are awarded to the prevailing party in nearly every civil action or proceeding. This reality arises from section 1032, subdivision (b), which states, 'Except

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10 "Section 1033.5 provides for the recovery of specified costs under section 1032. Subdivisions (a)(10)(B) and (c)(5) of that section, as amended by Statutes 1993, chapter 456, section 15, pages 2537-[2538], provide in part: '(a) The following items are allowable as costs under Section 1032: [¶] . . . [¶] (10) *Attorney fees, when authorized by any of the following*: [¶] (A) Contract. [¶] (B) *Statute*. [¶] (C) *Law*. [¶] . . . [¶] (c) Any award of costs shall be subject to the following: [¶] . . . [¶] (5) *When any statute of this state refers to the award of 'costs and attorney's fees,' attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a)*. Any claim not based upon the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof. Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs pursuant to *subparagraph (A) or (C) of paragraph (10)* of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties. [¶] Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a).' " (*Dowling*, *supra*, 85 Cal.App.4th at p. 1431, footnote omitted.)

as otherwise expressly provided by statute, a prevailing party is entitled *as a matter of right* to recover costs in any action or proceeding.' (Italics added.) We relied on this circumstance in construing the statutory antecedent of section 917.1 (former section 942): 'A judgment for costs is not the judgment directing the payment of money contemplated by section 942. If such were the fact, a stay bond would be required in almost every conceivable case, when, to the contrary, it is only required in the four cases covered by sections 942 to 945 of the code . . . .' [Citation.] In other words, if a judgment for costs awarded under section 1032 were a money judgment within the meaning of section 917.1, virtually every judgment would be within the scope of section 917.1, and an undertaking would be required to stay every judgment pending appeal. The exception in section 917.1 to the automatic stay provision of section 916 would cease to be an exception; it would subsume the general rule. Such a result could not have been consistent with the Legislature's intent. We therefore have held that a judgment for costs alone was not a judgment directing the payment of money within the meaning of former section 942 (now section 917.1, subdivision (a)) and was therefore stayed without the need for an undertaking. [Citations.] This rule has become well established." (*Bank of San Pedro, supra*, 3 Cal.4th at pp. 800-801.) The high court emphasized that in each of its prior decisions on this point, however, "the costs were of a *routine nature, such as those awarded as a matter of right under section 1032*." (*Bank of San Pedro*, at p. 801, italics added.)

Thus, in framing the issue, which there involved an award of expert witness fees under section 998, subdivision (c), the court looked to whether the costs at issue were

routine or not routine, finding them to be nonroutine and thus not automatically stayed without an undertaking. (*Bank of San Pedro*, *supra*, 3 Cal.4th at pp. 803-805.)[11] The court reasoned the expert witness fees were a nonroutine cost because (1) a *losing* defendant could recover its costs under the statute, and (2) an award of expert witness fees is "always within the trial court's discretion" in contrast to costs awarded under section 1032, which are awarded " 'as a matter of right.' " (*Bank of San Pedro*, at p. 803.)

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11 Both *Chamberlin*, *supra*, 188 Cal.App.3d at pp. 360-362 and *Nielsen v. Stumbos* (1990) 226 Cal.App.3d 301, 305 were decided before *Bank of San Pedro*, and thus neither court undertook an analysis as to whether the costs awarded were routine or nonroutine. In *Chamberlin*, this court construed section 917.1 and held that in determining the amount of an undertaking, the trial court must consider the amount of a Civil Code section 1717, subdivision (a) attorney fee award. The *Bank of San Pedro* court described *Chamberlin*'s holding: "Because the case was decided before the 1986 amendment to section 917.1 (which requires the inclusion of costs in a damages judgment when computing the amount of the undertaking), the question was whether the award of attorney fees under Civil Code section 1717 had to be included within the judgment in computing the amount of the undertaking. The court concluded the then-existing rule that costs were *not* included for such purpose did not extend to the award of attorney fees. 'Unlike the costs involved in the early cases, such attorney fees are in the nature of a directly litigated issue rather than merely incidental to the judgment. Further, attorney fees are not the type of costs involved in virtually every case. Attorney fees are awarded only in limited situations.' " (*Bank of San Pedro*, *supra*, 3 Cal.4th at p. 802, quoting *Chamberlin*, at p. 362.) In *Nielsen*, the Third District Court of Appeal distinguished *Chamberlin* to hold that "[t]he language of [Civil Code] section 1717 and recent legislation affecting related statutes leads us to conclude that contractual attorney fees awarded a party who recovers no money damages are to be treated as any other incidental cost of litigation for purposes of the automatic stay provisions of section 916. Accordingly, no undertaking need be posted by the plaintiff, the appellant here." The *Nielsen* court observed that *Chamberlin* involved a judgment for not only attorney fees, but also money damages. (*Nielsen*, at p. 305.) *Nielsen* held the automatic stay applied when there was no money judgment, only an award of attorney fees and costs. (*Ibid.*)

This court applied the above statutes and the *Bank of San Pedro* "routine costs" standard in *Dowling*, *supra*, 85 Cal.App.4th 1400, to decide whether an appeal bond or undertaking was required to stay the enforcement of a judgment for reasonable attorney fees and costs awarded to a prevailing defendant under section 425.16, commonly known as the anti-SLAPP statute. (*Dowling* at p. 1432.) We held under the express language of section 917.1, subdivision (a)(1), that such a judgment was unquestionably a judgment for payment of money so as to require an undertaking to stay enforcement of the judgment. (*Ibid*.) Looking to the operation of the anti-SLAPP statute, this court reasoned the judgment "cannot be construed as an award of routine or incidental costs subject to the automatic stay rule" under subdivision (d) of section 917.1. (*Dowling*, at p. 1432.) There were two basic reasons for our holding. First, we held the statutory award under the anti-SLAPP statute is not routine because the award is not reciprocal: the anti-SLAPP statute authorized only the SLAPP *defendant* to recover reasonable attorney fees after prevailing on a special motion to strike under the statute; a prevailing *plaintiff* is not entitled to recover fees and costs unless he or she shows the defendant's motion was frivolous or solely intended to cause unnecessary delay. (*Dowling*, at pp. 1432-1433.) Second, we looked to the legislative intent "to provide SLAPP defendants an efficient tool to quickly and inexpensively unmask and defeat SLAPP suits." (*Id*. at p. 1433.) We were "persuaded the Legislature intended to deter SLAPP litigation not only at the trial court level, but also in the appellate courts in order to protect the proper exercise of First Amendment rights. Requiring a SLAPP plaintiff who appeals from an adverse judgment under the anti-SLAPP statute to give an undertaking to stay enforcement of the portion of

the judgment awarding reasonable attorneys fees and costs to the prevailing defendant under section 425.16, subdivision (c), will promote meritorious appeals, and will deter continued SLAPP litigation at the appellate level." (*Dowling*, at pp. 1433-1434.)

C. *Standard of Review and Analysis*

The question at hand is whether, looking to the operation of the applicable statutes and the Legislature's intent (*Bank of San Pedro, supra*, 3 Cal.4th at pp. 800, 803-804), the trial court's judgment for attorney fees and costs here is a judgment for " 'money or the payment of money' " under section 917.1, subdivision (a)(1) or whether it is a judgment " 'solely for costs awarded under Chapter 6 (commencing with Section 1021) of Title 14' " within the meaning of section 917.1, subdivision (d). (*Dowling, supra*, 85 Cal.App.4th at p. 1432.) The answer requires us to decide whether the costs awarded to Association here were routine or nonroutine costs. (*Bank of San Pedro*, at pp. 803-804.)

Here, we conclude the Association's judgment for attorney fees is automatically stayed pending any appeal on grounds the attorney fees awarded are a routine or incidental item of costs, awarded as a matter of right to the prevailing party. The Association prayed for recovery of their attorney fees "pursuant to statute and contract." As recounted above, the trial court found Association to be the prevailing party, and, determining that its action was one to enforce express provisions in the CC&Rs, awarded it attorney fees and costs under Civil Code section 1354. Civil Code section 1354, subdivision (c), provides: "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs." Under section 1033.5, when attorney fees are authorized under "any" California statute that refers to the

award of "costs and attorney's fees," such fees are recoverable under section 1032 as "an item and component of the costs. . . ." (§ 1033.5, subd. (c)(5); see *Dowling, supra,* 85 Cal.App.4th at p. 1433; *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, 655, fn. 2 ["section 1033.5, also part of chapter 6, includes attorney's fees authorized by a contract as an item of costs (subd. (a)(10)(A))"].)

Unlike the attorney fee award under the anti-SLAPP statute in *Dowling, supra,* 185 Cal.App.4th 1400 or the section 998 expert witness fee award in *Bank of San Pedro, supra,* 3 Cal.4th 797, the statutory award of attorney fees under Civil Code section 1354 is expressly awarded to the *prevailing party* (i.e., it is reciprocal), such attorney fees are awarded as a matter of right, and there is no discretion afforded to the trial court in granting or denying such fees, other than as to their reasonableness and amount. In our view, if we were to characterize the attorney fee award here as a judgment in substance "directing the payment of money," we would write out of section 917.1, subdivision (d) any attorney fees awarded as costs under section 1032. The Legislature has not provided for such an exception, and we will not rewrite the statute to create it. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633 [" 'This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed' "].) Thus the Stantons' appeal from the costs and fee order stayed its enforcement under section 916. "Since the appeal is limited to the order awarding costs, including attorney's fees, it is within the exclusion of the final provision of section 917.1, subdivision (d). As we have discussed, that provision

eliminates the requirement of an undertaking when the appeal is solely from an award of costs." (*Ziello v. Superior Court*, *supra*, 75 Cal.App.4th at p. 655.)

We decline to read *Bank of San Pedro, supra,* 3 Cal.4th 797 as equating all attorney fee awards with expert witness fees, as did the court in *Behniwal v. Mix, supra,* 147 Cal.App.4th at pages 633-634, and footnote 8. The high court's analysis in *Bank of San Pedro* was directed solely at the expert fees awarded under section 998, and its reasoning was based on the operation of that statute. Further, *Behniwal* conceded that its discussion of the issue was not for the purpose of squarely deciding whether or not an undertaking was required, but only relevant to demonstrate the flaws in one of the parties' arguments. (*Behniwal*, *supra*, 147 Cal.App.4th at p. 634.) We do not follow *Behniwal* to the extent its holding can be read to encompass a judgment solely for costs and attorney fees awarded to the prevailing party under Civil Code section 1354.

In sum, under section 916, subdivision (a) the trial court should have granted the stay of execution of the judgment in its entirety.

DISPOSITION

The judgment and postjudgment orders are affirmed. The temporary stay issued on October 29, 2009, is vacated. The petition for writ of supersedeas staying enforcement of the judgment for attorney fees and other costs is granted. The parties shall bear their own costs on appeal.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.